

Fraud in Regulated Settings: Detrimental Reliance by the Victim not always Required

In the recent decision of *R. v. Riesberry*,¹ the Supreme Court of Canada reiterated the elements that the Crown needs to prove to establish the criminal offence of fraud. *Riesberry* involved charges under ss. 209 (cheating while playing a game) and 380(1) (general offence of fraud) of the *Criminal Code*.

Evidence was brought at trial which showed that the accused, a licensed horse trainer, injected a horse with drugs with a view to improve the horse's performance during a race and later attempted to sneak syringes containing such substances into a race for the same purpose.

The trial judge acquitted the accused on all charges, concluding that (i) horse racing is not a "game" for the purpose of the offence of cheating while playing a game with the intent to defraud pursuant to s. 209 of the *Criminal Code* and (ii) there was no causal connection between the acts of the accused and any risk of loss for the betting public.

The Ontario Court of Appeal set aside the acquittals, found the accused guilty on the fraud counts and ordered a new trial with respect to the cheating charges.

The Supreme Court dismissed the appeal brought by the accused, thereby confirming the Court of Appeal's decision. After determining that horse racing is a game of "mixed chance and skill" and that the accused's conduct could therefore constitute cheating while playing a game under s. 209 depending on the evidence, the Supreme Court went on to conclude that all components of the offence were present to enter convictions on the fraud counts.

¹ 2015 SCC 65.

Elements of the offence of fraud reiterated

Fraud, which consists of dishonest conduct that results in at least a risk of deprivation to the victim, is a typical criminal offence. To be established, the prosecution must prove a prohibited act (*actus reus*) and a subjective intent, the required state of mind (*mens rea*), beyond a reasonable doubt. Cromwell J, writing for a unanimous Supreme Court, reiterated that the elements required to establish the offence of fraud under the *Criminal Code* are the following: (i) for the *actus reus*, (a) an act of deceit, a falsehood or some other fraudulent means and (b) a risk of deprivation caused by same; and (ii) for the *mens rea*, subjective knowledge (a) of the prohibited act and (b) that same could have as a consequence the deprivation of another.

Proof of reliance on or inducement by dishonest conduct is unnecessary for certain fraudulent acts

On the fraud charges, the accused's main submission was that in the absence of evidence that his acts caused any risk of deprivation, or that if there was any such risk, it was too remote in the context of a horse race, the offence of fraud could not be established. He added that the Crown did not adduce evidence demonstrating that anyone had been induced to bet or not to bet by his conduct, therefore failing to prove a sufficient causal connection between the fraudulent act and the victim's risk of deprivation.

The Supreme Court rejected such submissions and found that while proof of reliance on fraudulent conduct or inducement by such conduct to the victim's detriment may establish the required causal link to establish fraud, it is not the only way to do so. Cromwell J. explained that for certain types of fraudulent behaviour, a casual relationship may be established without evidence of detrimental inducement or reliance on the part of the victim.

The Supreme Court held that misrepresentations and deception are not the only types of fraudulent conduct contemplated by s. 380(1) of the *Criminal Code*, since that section also deals with "other fraudulent means". Criminal fraud, unlike the civil tort of deceit, encompasses more than just fraudulent misrepresentations; it also covers "[a]ll other means which can properly be stigmatized as dishonest."²

² Ibid, at para 23.

For such "other fraudulent means", the Supreme Court indicated that the required casual connection may not depend on demonstrating the victim's detrimental reliance or inducement. Cromwell J. commented that in the context of highly regulated activities such as horse racing, conduct prohibited by regulations may "properly be stigmatized as dishonest."³ The Supreme Court therefore concluded that the public was put at risk of deprivation by the accused's conduct, as a rigged race creates a risk of prejudice, and found him guilty on the fraud counts.

Comments

In addition to reiterating the elements of the offence of fraud, the Supreme Court's decision in *Riesberry* is interesting in that it clarified that fraud encompasses more than just deceit such as misrepresentations of facts on which the victim relied to his or her detriment or which created a risk of deprivation. Not all fraudulent acts require the Crown to demonstrate that the victim relied on the dishonest acts or was induced by them. Other dishonest conduct, such as that of the accused in *Riesberry*, may put the pecuniary interests of another at risk and thus amount to fraud, without any proof of reliance or inducement.

In regulated settings, conduct prohibited by provincial or federal statutes and regulations may lead to a conviction for fraud even in the absence of detrimental reliance. One such setting is the securities industry, where there is a high risk of criminal liability for stakeholders. Committing prohibited deceptive acts that constitute regulatory offences under securities legislation (e.g. false/misleading disclosures or improperly influencing or attempting to influence market prices) may, in addition to resulting in a conviction under such legislation, lead to a conviction for fraud without the prosecution having to prove that investors relied on such prohibited conduct to their detriment. Moreover, conduct that is prohibited pursuant to the *Competition Act*, such as the criminal offences of bid-rigging and conspiracies, agreements or arrangements between competitors (e.g. price fixing cartels), may also result in a conviction for fraud under the *Criminal Code* in circumstances where the elements of such an offence are present.

The net of criminal liability for fraud may therefore be broader in regulated contexts, where one is subject not only to civil sanctions, fines and imprisonment for violating specific provincial or federal statutes and regulations, but also to a criminal conviction for fraud. A

³ Ibid, at para 25.

conviction for fraud pursuant to the *Criminal Code* can have serious effects for individuals where the amount of the fraud exceeds one million dollars. In such cases, the court must impose a minimum of two years of imprisonment.

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a cautionary note

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